United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 20, 2008

TO : James F. Small, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Kaiser Permanente
Cases 21-CA-37838, et al.

SEIU-UHW Southern California
Cases 21-CB-14342, et al.

512-5084-5033
512-5084-5050
518-4020-8300
518-4040-1700
518-4040-5000
530-2075-6767-0800
536-2563

The Region submitted these Section 8(a)(2) and (1), 8(b)(1)(A) and (2) cases for advice on (1) whether the parties engaged in unlawful pre-recognition bargaining under Majestic Weaving[1] by agreeing to apply their National and Local Agreements to a unit of employees if they selected the Union as their bargaining representative, and by entering a neutrality and card check agreement that prematurely set terms and conditions of employment; (2) whether to dismiss as moot allegations regarding the parties' card check procedure and granting of recognition because the parties have already voided both the results of the card check and the recognition; and (3) whether the Employer's July 2007 memorandum unlawfully stated that the Union had achieved majority status and unlawfully guaranteed a future Union organizing campaign.

We conclude that (1) neither the National nor the Local Agreement amounted to unlawful pre-recognition bargaining under Majestic Weaving, and the Charging Parties have failed to provide any evidence that the neutrality and card check agreement constituted unlawful pre-recognition bargaining; (2) the parties' voiding of both the

[1] Majestic Weaving Co., 147 NLRB 859, 860-861 (1964), enf. denied on other grounds 355 F.2d 854 (2d Cir. 1966).

recognition and the results of the underlying card check fully remedies any alleged violations arising from conduct during the card check procedure, but the Region should issue a merit dismissal of the allegation that the Employer prematurely recognized the Union when the scope of the bargaining unit was unclear; and (3) the Employer's July 2007 memorandum did not contain any unlawful threats of reprisals or promises of benefits.

FACTS

Kaiser Permanente ("the Employer") operates numerous medical facilities throughout the country. The Coalition of Kaiser Permanente Unions ("the Coalition") is composed of various member unions, including SEIU-UHW, Southern California ("the Union"), that represent Kaiser employees at those facilities. In 1997, the Employer and the Coalition entered a National Labor-Management Partnership Agreement that states the parties will, among other things, resolve representation issues in the most expeditious manner and the Employer will remain neutral during organizing drives initiated by Coalition unions.

In October 2005, the Employer and the Coalition entered into a National Agreement, separate from the Partnership Agreement, that addressed a variety of employment terms beyond those set forth in various local collective-bargaining agreements between the Employer and individual Coalition unions. Section 3 of the National Agreement, entitled "Scope of the Agreement," states in relevant part:

> A. COVERAGE
> This Agreement applies only to bargaining units represented by local unions that Kaiser Permanente and the Coalition mutually agreed would participate in the national common issues bargaining process and who, prior to the effective date, agreed to include this Agreement as an addendum to their respective local collective bargaining agreements. . . . The parties agree that when a local union signatory to this Agreement is recognized to represent a new bargaining unit of an Employer . . ., the local parties shall use an interest-based process to negotiate the terms of a local collective

> bargaining agreement and the appropriate transition to this Agreement.
>
> B. THE NATIONAL AGREEMENT AND LOCAL AGREEMENTS
> Provisions of local collective bargaining agreements and this Agreement should be interpreted and applied in the manner most consistent with each other and the principles of the Labor Management Partnership. If a conflict exists between specific provisions of a local collective bargaining agreement and this Agreement, the dispute shall be resolved pursuant to the Partnership Agreement Review Process in Section 1.L.2. . . . If there is a conflict, unless expressly stated otherwise, this Agreement shall supersede the local collective bargaining agreements. . . .

At the same time, the Employer and the Union entered a Local Agreement covering represented employees in Southern California facilities. The recognition clause of that agreement states:

> A. EXCLUSIVE COLLECTIVE BARGAINING AGENT.
> The Cross-Regional Master Agreement is entered into by the signatory parties and reflects the Employer's recognition of the Unions listed in Attachment 1 as the exclusive collective bargaining agent of the Employees in the bargaining units listed in Attachment 1 with respect to the terms and conditions of employment set forth herein.
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> * * *
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> B. UNIT CLARIFICATIONS, ACCRETIONS, AND/OR AGREEMENTS.
> This Agreement shall also apply to any Employees who are added to the bargaining unit by unit clarification, accretion and/or Agreement of the parties.
>
> C. CREATION OF NEW CLASSIFICATIONS.
> This Agreement shall also apply to any new classifications(s) which may be established

> within the scope of duties now included within a covered bargaining unit.
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> * * *

The relevant portion of Attachment 1 of the Local Agreement states:

> The Employer recognizes the Union as the exclusive bargaining agent of the Employees covered by the Agreement for the purpose of collective bargaining with respect to rates of pay, hours of work and working conditions.
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> SCOPE: The terms "Employee" or "Employees" as and whenever used in this Agreement, shall mean and include all Employees of the Employer at the medical offices, hospitals, and business offices of the Employer located in Los Angeles and Orange Counties in the State of California, but excluding [seven specific job classifications]. In the event the Employer's [sic] signatory to this Agreement establishes or operates any medical office in Ventura County which serves as a satellite medical office to an existing Medical Center in Los Angeles County, Employees represented and covered by this Agreement who are transferred to said facilities shall continue to be represented by [SEIU-UHW], and wages, terms and conditions of the Agreement shall apply to them, for the classifications set forth in the Agreement. In addition, future Employees hired by the Employer to work at the above satellite medical office(s) shall be required to meet the Union membership requirements set forth [herein].
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> * * *

On May 1, 2006, the Employer and the Union entered into a card check agreement for facilities covered by the parties' Southern California Local Agreement.[2] By letter of the same date, the Employer informed the approximately 400

[2] The Charged Parties refused to provide a copy of their May 2006 neutrality and card check agreement to the Region.

Status 5 clerical employees at its three facilities in and around Pasadena, California, of the card check agreement and asked whether they objected to having their home addresses and telephone numbers disclosed to the Union. The Employer and the Union also provided the Status 5 clericals an outline of the procedures involved in the card check and noted that the Employer would remain neutral in the process.

When the Union began its effort to collect signed cards from the Status 5 clericals, card solicitors often approached employees who were on their work time and in their work areas.[3] On at least two occasions, card solicitors were also permitted to reserve on-site conference rooms to hold pro-Union luncheons. This occurred even though one employee asserts that the Employer had announced that, in order to remain neutral, the Employer would not allow clericals to hold meetings on its premises. Another employee asserts that one card solicitor used an Employer photocopier to make copies of blank authorization cards. Employees also assert that some card solicitors told them that they would receive specific improvements in employment terms, such as a five or ten percent raise and job protection, if they signed a card, and that some card solicitors also said that everyone was signing or that signing a card was only a request for additional information about the Union.[4]

On December 28, 2006, a mediator conducted a card check and determined that a majority of the Status 5 clericals had signed cards for the Union. In accordance with the parties' card check agreement, the mediator certified the Union as the exclusive bargaining representative of a unit of Status 5 clericals.

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[3] Witnesses stated that they did not know if the card solicitors were employees or non-employee Union organizers. A report on the Union's website states that "[a] team of staff and member organizers" conducted the card check campaign.

[4] The Charging Parties adduced no evidence showing that any employee who was told that the card was only for information purposes then signed a card.

By letter dated January 10, 2007, the Union informed the Status 5 clericals that it had obtained a card majority and was now their bargaining representative. The letter stated that employees would be informed on how to elect a bargaining team to negotiate an initial contract and that there would be a membership meeting to generate and discuss bargaining proposals. The letter closed by noting that terms and conditions of employment would not change during negotiations, that employees would not have to pay dues during that time, and that Union initiation fees were waived.

On June 21, 2007, four Status 5 clerical employees filed Section 8(a)(2) and (1), and 8(b)(1)(A) and (2) charges alleging that the Employer had unlawfully recognized the Union and the Union had unlawfully accepted that recognition. The charges alleged specifically that the parties had engaged in unlawful pre-recognition bargaining, and that the validity of the card check was tainted because the Employer had allowed pro-Union agents to solicit cards during work time on company premises, because of misrepresentations of card solicitors, and because the parties manipulated the scope of the bargaining unit to ensure a card majority.

By memorandum dated July 23, 2007, the Employer informed the Status 5 clericals that the parties had mutually agreed to void the results of the card check and that the Employer was withdrawing recognition from the Union. Specifically, the memorandum states,

> before any substantive negotiations took place we became aware of confusion concerning the employees who were eligible to participate in the card count and the job classifications that were included in the card count group. . . . Although we continue to believe that the card count reflected the wishes of a majority of employees in the card count group, the parties also recognized that some uncertainty remained. Accordingly, after thorough consideration the parties have agreed to vacate the card count. This means that [the Union] is not the representative of employees in the Status [5] card count classifications. . . . This activity

does not preclude future attempts to organizing this group of employees. . . .

ACTION

We conclude that (1) no unlawful pre-recognition bargaining occurred because (a) the National Agreement permits but does not require the parties to apply its terms to newly organized employees; (b) to the extent the recognition clause of the Local Agreement can be interpreted as an after-acquired clause, it lawfully applies the Local Agreement to the Status 5 employees because they would become unit employees[5]; and (c) the Charging Parties have failed to provide any evidence that the parties' May 2006 neutrality and card check agreement contained terms of employment which would constitute unlawful pre-recognition bargaining under Majestic Weaving; (2) the parties' voiding of both the Union's recognition and the results of the underlying card check fully remedies any alleged violations arising from the card check procedure, but rather than dismissing it as moot, the Region should issue a merit dismissal of the allegation that the Employer prematurely recognized the Union when the scope of the bargaining unit was unclear; and (3) the Employer's July 2007 memorandum did not contain any unlawful threats of reprisals or promises of benefits.

I. THE EMPLOYER AND THE UNION DID NOT ENGAGE IN PRE-RECOGNITION BARGAINING

An employer violates Section 8(a)(2) and a union violates Section 8(b)(1)(A) by negotiating a collective-bargaining agreement when the union has not achieved majority status.[6] In Majestic Weaving, the Board held that such conduct violates the Act even when the recognition and contract are conditioned upon the union's achieving majority support.[7] This is because premature contract

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[5] See Supervalu, Inc., 351 NLRB No. 41, slip op. at 3 (2007).

[6] International Ladies' Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 737-738 (1961).

[7] 147 NLRB at 860.

negotiation affords the minority union "a deceptive cloak of authority with which to persuasively elicit additional employee support," tainting any employee support the union subsequently obtains.[8] Under these principles, neutrality agreements containing terms and conditions of employment that would apply to employees if the union obtained majority status also violate Section 8(a)(2) and 8(b)(1)(A).[9]

A. The October 2005 National Agreement

Section 3.A. of the National Agreement, entitled "Coverage," requires the parties to "transition" to the National Agreement after reaching their own local collective-bargaining agreement. This language is lawful under Majestic Weaving because it explicitly requires bargaining for a separate agreement; therefore, although it permits it does not mandate application of the entire National Agreement. Section 3.B., entitled "The National Agreement and Local Agreements," also does not require application of the National Agreement to a newly organized unit. Rather, it explicitly permits parties to bargain for terms and conditions wholly different from the National Agreement and then specifies how parties will resolve any conflict between their local agreement and the National Agreement. It is only when parties do not "expressly state" that the terms of their local agreement resolve any conflict with those in the National Agreement that the National Agreement will supersede the local agreement. In sum, neither of these sections requires application of the National Agreement to a group of newly organized employees that becomes part of the National Agreement unit.[10] On the

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[8] Bernhard-Altmann Texas Corp., 366 U.S. at 736.

[9] See Thomas Built Buses, Inc., Cases 11-CA-20038, 11-CB-3455, Advice Memorandum dated September 17, 2004 (8(a)(2) and 8(b)(1)(A) violations where, in conjunction with neutrality agreement, parties agreed to provisions concerning guaranteed transfer rights, severance in the event of layoff or plant closure, strikes and subcontracting prohibitions, and restrictions on overtime, should the union obtain majority status).

[10] See Kaiser Permanente, Cases 5-CA-33362, et al., Advice Memorandum dated April 30, 2007 (same Employer and

contrary, these provisions, read separately or together, grant the parties the right to not apply the National Agreement to any individual unit.[11]

B. The Southern California Local Agreement

An exception to Majestic Weaving pre-recognition bargaining involves "after-acquired stores" or "additional stores" clauses negotiated by parties in an existing bargaining relationship. By such clauses, "the employer agrees to recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in [facilities] acquired after the execution of the contract."[12] In other words, newly organized employees can be subjected to terms and conditions of employment that were negotiated before they selected the union as their exclusive bargaining representative. Where such clauses apply to employees outside the existing unit, under Section 8(a)(2) they may be lawfully included in a labor contract only if they involve a mandatory subject of bargaining for the existing unit employees.[13] Such clauses involve a mandatory subject if they "vitally affect" the terms and

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different union did not engage in unlawful pre-recognition bargaining where same National Agreement was involved).

[11] We note that the Charging Parties have pointed out several provisions in the National Agreement, such as Section 2.A., which deals with wage rates, as examples of pre-recognition bargaining. The National Agreement does contain substantive employment terms that apply to numerous different bargaining units at Employer facilities throughout the country. However, as discussed above, Section 3 of the National Agreement makes it clear that the National Agreement does not automatically apply to newly organized units.

[12] Pall Biomedical Products Corp., 331 NLRB 1674, 1675 (2000), enf. denied 275 F.3d 116 (D.C. Cir. 2002).

[13] Cf. Supervalu, Inc., 351 NLRB No. 41, slip op. at 2-3 (stating contract application to after-acquired unit constitutes lawful mandatory subject where vitally affects test is met) (citing Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178-179 (1971)).

conditions of employment of the existing unit employees.[14] Where an after-acquired or additional stores clause applies to employees who would become part of the existing unit upon a showing of majority support for the union, the clause is automatically deemed to "vitally affect" the terms of employment of the existing unit employees and, thus, be a mandatory subject.[15]

The recognition clause and Attachment 1 state that the bargaining unit covered by the Local Agreement is composed of represented employees at the Employer's facilities in Los Angeles and Orange Counties, which include the three Pasadena area facilities involved in this case. These provisions could be interpreted as an after-acquired clause that would automatically apply the terms of that agreement to newly organized employees upon a showing of majority support for the Union. But because the Status 5 clericals would become part of an existing unit, the vitally affects test for finding a mandatory bargaining subject is satisfied. Thus, the Local Agreement falls within the exception to Majestic Weaving, and application of the Local Agreement to the Status 5 clericals could not constitute unlawful pre-recognition bargaining.[16]

C. The May 2006 Neutrality and Card Check Agreement

The Charging Parties allege that this agreement contains substantive employment terms that were unlawfully negotiated when the Union was not the majority

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[14] Id. See also Pall Biomedical Products Corp., 331 NLRB at 1675.

[15] See Supervalu, Inc., 351 NLRB No. 41, slip op. at 3; Pall Biomedical Products Corp., 331 NLRB at 1676; Kroger Co., 219 NLRB 388, 389 (1975). See generally Pittsburgh Plate Glass Co., 404 U.S. at 179; Teamsters Local 24 v. Oliver, 358 U.S. 283, 294 (1959).

[16] Cf. Supervalu, Inc., 351 NLRB No. 41, slip op. at 4 (employer did not violate Section 8(a)(5) by refusing to conduct card check at three after-acquired stores despite additional stores clause in parties' contract, where General Counsel neither showed that newly organized employees would become part of existing unit nor introduced evidence to prove additional stores clause vitally affected terms and conditions of existing unit employees).

representative. However, they have not provided any evidence to support this allegation. The mere existence of a neutrality agreement does not create any presumption or suspicion of unlawful pre-recognition bargaining.[17] Moreover, as discussed above, the National and Local Agreements do not constitute unlawful pre-recognition bargaining and no evidence even suggests that the neutrality and card check agreement contains unlawfully bargained terms.[18] The Charging Parties are simply speculating that the neutrality and card check agreement unlawfully sets terms and conditions of employment. Given this lack of evidentiary support, the Region should dismiss this charge allegation, absent withdrawal.[19]

II. THE PARTIES' VOLUNTARY AGREEMENT TO NULLIFY THE EMPLOYER'S RECOGNITION OF THE UNION FULLY REMEDIES ANY ALLEGED VIOLATIONS BASED ON CONDUCT DURING THE CARD CHECK PROCEDURE

The Charging Parties specifically allege that: (1) the Employer discriminatorily granted card solicitors access to the Employer's premises and permitted solicitation during

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[17] Neutrality agreements between an employer and a minority union that establish procedures for an organizing campaign and do not establish terms and conditions of employment are lawful. See, e.g., Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993); Hotel & Restaurant Employees Local 2 v. Marriott Corp., 961 F.2d 1464, 1469-70 (9th Cir. 1993); New Otani Hotel & Garden, 331 NLRB 1078, 1082 (2000).

[18] Any promises by card solicitors that employees would receive specific benefits if they signed a card and obtained Union representation was nothing more than lawful campaign propaganda that typically accompanies organizing drives. See, e.g., Le Marquis Hotel, LLC, 340 NLRB 485, 489-490 (2003); Missouri Beef Packers, Inc., 197 NLRB 176, 184 (1972); American Beef Packers, Inc., 180 NLRB 634, 635 (1970). Nothing in those campaign promises shows that the Employer and the Union had included substantive employment terms in the neutrality and card check agreement.

[19] We also conclude that it would be inappropriate to issue an investigative subpoena for the May 2006 agreement based only upon the Charging Party's speculation, which appears grounded in the lawful campaign propaganda of the card solicitors.

the work time of card signers; (2) card solicitors used misleading statements to obtain signed Union authorization cards; and (3) the parties manipulated the scope of the bargaining unit to guarantee a card majority for the Union. Because of these alleged violations, the Charging Parties request that complaint issue seeking a remedy prohibiting the Employer from recognizing the Union unless it is certified by the Board, i.e., prohibiting any recognition based on a card check procedure.

We conclude first that the Employer did not grant card solicitors any discriminatory access to its facilities. Second, any alleged misrepresentations by card solicitors that may have tainted signed cards are irrelevant given that recognition has long since been withdrawn. In any event, there is no evidence that card solicitors actually made any statements that would have restrained or coerced employees into signing a card. Finally, while we conclude that the Employer unlawfully granted recognition to the Union at a time when the scope of the unit was unclear, a merit dismissal is appropriate for this technical violation and there is no need to seek a remedy barring recognition absent Board certification.

A. The Employer Neither Unlawfully Granted Card Solicitors Access to Its Premises nor Unlawfully Allowed Solicitation During the Work Time of Card Signers

Although the evidence fails to clearly establish whether the card solicitors were employees or non-employee Union organizers, we find no unlawful conduct in either case. Assuming they were employees, an employer does not violate the Act by permitting pro-union employees to engage in union activity on work time, or to use the employer's equipment for that purpose unless the employer prohibits anti-union employees or employees supporting another union from engaging in similar activity.[20] In Raley's, a store employee who supported an independent union obtained petition signatures from coworkers on their work time, used the employer's telephones to solicit employee support at other of the employer's stores, and used the employer's fax

[20] See, e.g., Raley's, 348 NLRB No. 25, slip op. at 3-4 (2006).

machine to send copies of the petition to the other stores.[21] The Board held that the employer had not unlawfully assisted the independent union because the evidence failed to show that the employer had prohibited employees who opposed the independent union, or those who supported a rival union, from engaging in the same activities.[22]

Here, as in Raley's, the Charging Parties have not provided any evidence showing that the Employer prohibited anti-Union employees from engaging in the same activities as the card solicitors. There is no evidence that anti-Union employees were prohibited from approaching coworkers during work time, and no evidence that anti-Union employees either requested or were denied access to on-site conference rooms. While one card solicitor may have used one of the Employer's photocopiers to make extra copies of an authorization card, there is no evidence that the Employer either denied the same privilege to anti-Union employees or had any knowledge of or condoned that activity.

This same result obtains, albeit for different reasons, assuming the card solicitors were non-employee Union organizers. "[A] certain amount of employer cooperation with the efforts of a union to organize is insufficient to constitute unlawful assistance. . . . [T]he use of company time and property does not per se, establish unlawful employer support and assistance."[23] Rather, the Board considers whether the amount of an employer's indirect pressure on employees, such as directing and paying them to attend union meetings on work time, or direct pressure, such as permitting a union to solicit cards in front of management officials, would "reasonably tend[] to coerce employees in the exercise of their free choice in selecting a bargaining

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[21] Id.

[22] Id. Indeed, the facts showed that the employer had allowed employees who supported a rival UFCW local to engage in the same organizing activities. Id., slip op. at 3.

[23] Longchamps, Inc., 205 NLRB 1025, 1031 (1973).

representative."[24] Where both kinds of pressure exist, especially when coupled with a rapid and unverified grant of recognition by the employer, the Board finds unlawful assistance in violation of Section 8(a)(2).[25] On the other hand, the Board has dismissed complaints that presented something less than this combination of coercive factors.[26] Here, there is no evidence that the Employer exerted any of these indirect or direct pressures during the card check procedure. Thus, even assuming the card solicitors were non-employee Union organizers, there was no unlawful assistance here.

B. Allegations Regarding Tainted Cards On Which Recognition Was Based Are Now Irrelevant, and the Card Solicitors Did Not Otherwise Violate Section 8(b)(1)(A)

The Charging Parties assert that many of the signed cards collected during the 2006 card check procedure were tainted by the misrepresentations of card solicitors. These misrepresentations included statements that the purpose of the cards was only to request additional information about the Union, that employees would be receiving specific improvements in employment terms, or that a majority of the unit employees had already signed cards. Because the Employer and the Union have already agreed to void the recognition of the Union and the results of the underlying card check procedure, there is no reason to address the validity of the collected cards.[27]

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[24] Vernitron Electrical Components, Inc., 221 NLRB 464, 465 (1975), enfd. 548 F.2d 24 (1st Cir. 1977).

[25] Id.

[26] See, e.g., 99¢ Stores, Inc., 320 NLRB 878, 878 n.2 (1996); Longchamps, Inc., 205 NLRB at 1031; Coamo Knitting Mills, Inc., 150 NLRB 579, 581-582 (1964); Jolog Sportswear, Inc., 128 NLRB 886, 888-889 (1960), affd. sub nom. Kimbrell v. NLRB, 290 F.2d 799 (4th Cir. 1961).

[27] Moreover, it is unclear if the card solicitors made misrepresentations that would have invalidated any of the signed cards. An employee who signs a single-purpose, union authorization card is bound by that card's clear language unless the union adherent soliciting the card directs the employee to disregard that language. See NLRB v. Gissel Packing Co., 395 U.S. 575, 606-607 (1969). Oral

Even assuming that the card solicitors made misrepresentations that would have invalidated some of the signed cards, there is no evidence that the Union independently violated Section 8(b)(1)(A) through these mere misrepresentations.[28] In Clement Bros., the union steward's threat that employees would lose their jobs if they failed to sign authorization cards violated Section 8(b)(1)(A) because it restrained and coerced employees in the exercise of their Section 7 rights.[29] To remedy the violation, the respondent-union was ordered to cease and desist from threatening employees with loss of employment or other economic reprisals.[30] In contrast, there is no evidence here that Union adherents restrained or coerced employees into signing cards by making threats of job loss or other form of retribution.

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statements that a card's "only" or "sole" purpose is to get more information or an election have been found to cause a signer to disregard the card's express language and, thus, invalidate the card. See, e.g., Sambo's Restaurant, Inc., 269 NLRB 1187, 1187-88 (1984). Here, the evidence does not show that any Status 5 clerical who actually signed a card was told that the "only" or "sole" purpose of the card was something other than what was printed on the card. Also, cards would not have been invalidated either by statements that employees would receive specific improvements in employment terms if they signed, see, e.g., Le Marquis Hotel, LLC, 340 NLRB at 489-490, or, in the circumstances here, by statements that everyone else was signing cards, see, e.g., Montgomery Ward & Co., 288 NLRB 126, 128-129 & n.17 (1988), remanded on other grounds 904 F.2d 1156 (7th Cir. 1990).

[28] See Clement Bros. Co., 165 NLRB 698, 698, 699, 707 (1967), enfd. 407 F.2d 1027 (5th Cir. 1969).

[29] See also Service Employees (GMG Janitorial, Inc.), 322 NLRB 402, 402 n.1, 413-415 (1996) (although issue not presented to Board, ALJ held union violated 8(b)(1)(A) where supervisor acted as union's agent and threatened employees with job loss and other retribution if they did not sign authorization cards).

[30] See Clement Bros. Co., 165 NLRB at 714.

C. The Employer Arguably Granted Recognition Unlawfully Because the Scope of the Unit Was Unclear; a Merit Dismissal Is Appropriate for this Isolated Violation

An employer arguably unlawfully recognizes a union when the scope of the recognized unit is unclear. For example, it is unlawful for an employer to recognize and execute a collective-bargaining agreement with a union at a time when the employer does not employ a substantial and representative complement of employees in the relevant bargaining unit, or at a time when it is not engaged in normal operations.[31] The traditional remedy for such a violation requires the employer to withdraw and also to withhold recognition from the unlawfully assisted union unless and until the union is certified by the Board.[32]

The current allegation is analogous to the violations outlined above. Here, the Employer's July 2007 memorandum to the clerical employees concedes that the scope of the unit was unclear during the 2006 card check procedure. Nevertheless, the Employer granted recognition to the Union based on the results of that card check. Accordingly, the Employer unlawfully assisted the Union by prematurely extending recognition at a time when it was not clear that the Union represented a majority of the unit employees.

Although the Employer and the Union have already voided the unlawful recognition, the Charging Parties argue that complaint should issue to require the Employer to

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[31] See, e.g., Elmhurst Care Center, 345 NLRB 1176, 1178-79 (2005) (employer had not begun normal business operations); Cascade General, 303 NLRB 656, 656-657 (1991) (employer had not hired substantial and representative complement of employees), enfd. 9 F.3d 731 (9th Cir. 1993), cert. denied 511 U.S. 1052 (1994); Allied Products Corp., 220 NLRB 732, 735 (1975).

[32] See Elmhurst Care Center, 345 NLRB at 1185; Cascade General, 303 NLRB at 675. Indeed, this is the traditional remedy when an employer recognizes a minority union and signs a bargaining agreement. See, e.g., Bernhard-Altmann Texas Corp., 366 U.S. at 739; Windsor Castle Health Care Facilities, 310 NLRB 579, 594 (1993), enfd. as modified 13 F.3d 619 (2d Cir. 1994).

withhold recognition unless and until the Union is certified in a Board election. However, several factors render a complaint unnecessary and make this case appropriate for a merit dismissal. First, the parties voluntarily voided the recognition at least seven months ago. Second, the traditional remedy sought by the Charging Parties is customarily ordered in cases where the parties have executed a contract and the unit employees have worked under the terms of that contract.[33] Here, the parties did not execute a contract or even engage in substantive negotiations, and the Status 5 clericals worked at all times under their usual conditions of employment.[34] Finally, the Employer and the Union have not committed any other, related unfair labor practices. In these circumstances, we conclude that the Union did not so unlawfully entrench itself that a Board election is required to ensure the free exercise of Section 7 rights. Thus, further proceedings to seek this remedy in settlement or litigation would not effectuate the purposes and policies of the Act, and the Region should issue a merit dismissal for the charge allegation that the Employer unlawfully recognized the Union, and the Union unlawfully accepted, when the scope of the unit was unclear.

III. THE EMPLOYER'S JULY 23, 2007 MEMORANDUM DID NOT CONTAIN ANY UNLAWFUL STATEMENTS

The Charging Parties argue that two statements in the Employer's July 23, 2007 memorandum unlawfully coerced employees. First, they argue that the letter falsely asserts that the Union had obtained a card majority even though the scope of the unit was indeterminate. The letter specifically states that "[a]lthough the parties continue to believe that the card count reflected the wishes of a majority of employees in the card count group, the parties

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[33] See, e.g., Elmhurst Care Center, 345 NLRB at 1176; Cascade General, 303 NLRB at 675; Allied Products Corp., 220 NLRB at 734.

[34] Cf. Flatbush Manor Care Center, 287 NLRB 457, 458-459 (1987) (no remedy for technical 8(a)(2) violation because representation election had already been held after employer had unlawfully recognized union and "particularly" because employer and union had not engaged in negotiations).

also recognized that some uncertainty remained." That statement does nothing more than inform the employees that despite the parties' beliefs about the results of the card check, the procedure itself was flawed. The statement does not contain any threat of reprisal or promise of benefit that could have interfered with the exercise of Section 7 rights.

Second, the Charging Parties argue that letter unlawfully guarantees future organization by the Union. The letter specifically states that the setting aside of the December 2006 card check results did not "preclude future attempts to organizing this group of employees." This statement does nothing more than assure the employees that the Employer would not interfere with their future exercise of Section 7 rights. It does not contain any guarantee that the employees would have the Union imposed on them as their exclusive bargaining representative.

In sum, the Region should issue a merit dismissal for the charge allegation that the Employer unlawfully recognized the Union, and the Union unlawfully accepted, when the scope of the unit was unclear. The Region should dismiss, absent withdrawal, the remaining allegations.

B.J.K.